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No. 76-306

# In the Supreme Court of the United States

OCTOBER TERM, 1976

MILTON EVEREST MITCHELL, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the administrative determination of deportability was "supported by reasonable, substantial, and probative evidence on the record considered as a whole."

2. Whether "substantial evidence" must support the Attorney General's discretionary decision to deny a person the privilege of voluntary departure.

## STATEMENT

Petitioner is a native and citizen of Trinidad. He last entered the United States on August 5, 1974, falsely claiming to be a United States citizen. Petitioner successfully gained admission at the Canadian border by presenting to the immigration officials the birth certificate of Cariel Wesley Oliver, a deceased citizen (R.

9, R. 14, R. 20 pp. 2, 8-9).[1] Petitioner's arrival without luggage in a taxi made officials suspicious, however, and they placed him under surveillance (Pet. 4). After two of petitioner's friends brought his car into the country, petitioner was questioned in a bus depot by immigration officials and admitted that he had falsely represented his citizenship in order to gain entry into the United States (R. 9).

Deportation proceedings were instituted charging petitioner with entering the United States without inspection, in violation of Section 241(a)(2) of the Immigration and Nationality Act, 66 Stat. 163, 204, 8 U.S.C. 1251(a)(2) (R. 21). Petitioner conceded the facts necessary to deport him[2]

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[1]"R." refers to the documents contained in the certified administrative record.

[2]See R. 20, pp. 1-2:

> [Judge] Q. * * * Is it true that you are not a citizen of the United States?
>
> [Petitioner] A. Yes, sir.
>
> Q. Is it true that you are a native and citizen of Trinidad?
>
> A. Yes, sir.
>
> Q. Is it true that you last entered the United States at Niagara Falls, New York at the Rainbow Bridge yesterday, August 5, 1974?
>
> A. Yes, sir.
>
> Q. And is it true that the officers admitted you as a citizen of the United States?
>
> A. Yes, sir.
>
> Q. But you are not a citizen of the United States?
>
> A. Yes, sir.
>
> Q. Now by entering as a citizen you avoided inspection as an alien and you are technically subject to deportation. Do you understand that?



and applied for the discretionary privilege of voluntary departure.

The immigration judge declined to grant petitioner the discretionary privilege of voluntary departure (R. 19). The immigration judge wrote that although petitioner was married to a United States citizen and had one child born in this country, he had planned his fraudulent entry into the United States, had failed to pay his income taxes, had probably engaged in adultery (an activity that would, by statute, preclude a finding of good moral character under Section 101(f) of the Immigration and Nationality Act, 8 U.S.C. 1101(f), and thereby render him ineligible for voluntary departure), and had failed to take any action with respect to obtaining an immigrant visa to normalize his immigration status during the 14 years since his initial entry in 1960.[3]

Petitioner appealed the decision denying him voluntary departure and, during the pendency of the appeal, also moved to reopen his deportation proceeding in order to apply for relief under Section 241(f) of the Immigration and Nationality Act, as added, 75 Stat. 655, 8 U.S.C. 1251(f).[4] The Board of Immigration Appeals dismissed

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> A. Yes, sir.
>
> Q. Now, you want the opportunity of leaving the United States voluntarily at your own expense instead of being deported?
>
> A. Yes, yes.

[3]Petitioner first entered the United States in 1960 as a non-immigrant visitor for pleasure, and he failed to depart at the expiration of his authorized visitation. From then until his trip to Canada in 1974 he illegally resided and worked in the United States (R. 20, pp. 5-6).

[4]Section 241(f) provides:

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were

the appeal, finding that "[d]eportability has been established by clear, convincing, and unequivocal evidence"; that petitioner, as an alien who had entered this country under a false claim of citizenship, was ineligible for Section 241(f) relief; and that the request for voluntary departure had been properly denied (R. 7). The court of appeals affirmed (Pet. App. A1).

## ARGUMENT

1. *Reid* v. *Immigration and Naturalization Service*, 420 U.S. 619, held that Section 241(f) relief is not available to an alien who escapes inspection at the border by entering this country under a false claim of citizenship. Petitioner attempts to avoid the effect of *Reid* by arguing that, despite his entry under a false claim of citizenship, he received the functional equivalent of inspection, and that in concluding otherwise the court of appeals improperly failed to consider the "evidence on the record * * * as a whole," as required by Section 106(a)(4), as added, 75 Stat. 651, 8 U.S.C. 1105a(a)(4).

Petitioner's argument depends upon the fact that the immigration officers were skeptical of his claim of citizenship and subjected him to questioning at the border. He asserts that this was tantamount to the "inspection" to which a known alien would be subjected. But 8 C.F.R. 235.1(b) requires that a person seeking to enter

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excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.



the country as a citizen establish his citizenship and provides that an immigration officer may conduct an "examination" until he is satisfied that the claim of citizenship is true. No more occurred here. Petitioner satisfied the officer of the truthfulness of his claim, was allowed freely to enter the United States as a citizen, and wholly avoided the stringent "inspection" procedures to which known aliens are subject.

The "detracting evidence" (Pet. 9) that petitioner claims was improperly disregarded by the court of appeals related to events occurring after his admission as a citizen and, at all events, failed to demonstrate that the administrative finding of deportability was not supported by "reasonable, substantial, and probative evidence." Nothing in petitioner's affidavits—apart from bare speculation—significantly detracts from the officer's affidavit (R. 9) and petitioner's testimony (R. 20, p. 2) that he was admitted as a United States citizen and that his true identity and citizenship were not ascertained until six hours later.

2. Petitioner also contends that the denial of the privilege of voluntary departure was not supported by substantial evidence. But the "substantial evidence" test is reserved by statute for the review of deportation orders. 8 U.S.C. 1105a(a). "Abuse of discretion" is the correct standard for review of denials of voluntary departure. As this Court observed in *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217, 228:

> Admittedly, the standard of review applicable to denials of discretionary relief cannot be the same as that for adjudications of deportability, since judicial review of the former is concededly limited to determinations of whether there has been any abuse of administrative discretion.

See also *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77.

An alien seeking the privilege of voluntary departure must show both that he is eligible for this relief and that such relief should be granted as a matter of discretion. 8 C.F.R. 242.17(d). The record shows that petitioner procured a fraudulent birth certificate months in advance of his illegal entry into this country for the specific purpose of facilitating that entry; that he failed to file a tax return, even though he had consulted an attorney in the matter; that during his stay in Canada he may have engaged in adultery; and that during the 14 years petitioner had illegally lived in the United States he never attempted to obtain permission to stay here lawfully. Under these circumstances, the denial of the privilege of voluntary departure did not constitute an abuse of discretion.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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